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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

KENNETH ERICKSON et al., Plaintiffs and Appellants, v. FRY'S ELECTRONICS, INC. et al., Defendants and Respondents.	D051814 (Super. Ct. No. GIC789990)

APPEAL from a judgment of the Superior Court of San Diego County, Ronald S. Prager, Judge. Affirmed.

In this action brought under the unfair competition law (UCL) (Bus. & Prof. Code, §§ 17200 & 17500),[1] plaintiffs Kenneth Erickson, Steve Thomas and Edward Bastek (collectively, plaintiffs) allege defendants Fry's Electronics, Inc., William Randolph Fry and Kathryn Kolder (collectively, Fry's) advertised certain products sold only in multiple

1 All further statutory references are to the Business and Professions Code unless otherwise specified.

units, but with the individual unit's price displayed more prominently than that of the multiple unit price. The court sustained without leave to amend Fry's demurrer to the plaintiffs' second amended complaint (SAC), finding plaintiffs had no standing to pursue this action because, based upon amendments to the UCL made after the passage of Proposition 64, plaintiffs must have suffered injury and lost money or property to pursue such a claim.

Plaintiffs appeal, asserting (1) the SAC adequately alleged injury to plaintiffs; (2) the SAC adequately alleged plaintiffs lost money or property as a result of their reliance on Fry's advertisements; (3) plaintiffs' claims are suitable for class treatment; and (4) the court should have stricken or taxed the costs claimed by Fry's in its memorandum of costs. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND[2]

A. *Original Complaint*

In June 2002 Webster Bivens filed a complaint as an individual, and on behalf of the general public, against Fry's Electronics, Inc., and two of its officers, directors and shareholders, William Randolph Fry and Kathryn Kolder. The complaint stated causes of action for unfair competition and false advertising under sections 17200 and section 17500. Bivens alleged that from September 1998 through May 2002, Fry's advertised

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2 Because we are reviewing the dismissal of a complaint following the sustaining of a demurrer, we take all well pleaded factual allegations in the complaint as true. (*Montclair Parkowners Ass'n v. City of Montclair* (1999) 76 Cal.App.4th 784, 790.)

products for sale in several newspapers, prominently stating the per unit price of the products, when in actuality the products could only be purchased in multi-unit sets.

B. *The Apex Case*

In 1999 Biven's attorney filed an action on behalf of Apex Wholesale, Inc. (Apex) against Fry's (*Apex Wholesale, Inc. v. Fry's Electronics, Inc.* (Super. Ct. San Diego County, 2002, No. GIC734991) (*Apex*)), which, among other allegations of unfair competition, alleged Fry's "advertis[ed] consumer goods which are sold only in multiple units but which are advertised at prices different than the minimum multiple unit price . . . ." The complaint also alleged Fry's engaged in false advertising by advertising goods with "pricing prominently stated as a 'per unit' price despite the non-availability of such merchandise for sale in single unit quantities."

The *Apex* case was tried in June 2001. Following the trial, the court granted an injunction prohibiting Fry's "from advertising any consumer goods for sale at a single unit price where the goods are sold only in multiple units and not in single units unless the advertisement also discloses, at least as prominently, the price of the minimum multiple unit in which they are offered." However, the court also denied the request for restitution related to this claim. Both sides appealed. Because the *Apex* case involved an issue identical to the claim made in this case, in February 2003 the court in this action issued a stay pending a final determination of that case. In June 2006, this court affirmed the injunctive relief order and the denial of restitution related to this claim. (*Apex Wholesale, Inc. v. Fry's Electronics, Inc.* (June 15, 2006, D041383) [nonpub. opn.].)

C. *Proposition 64*

In 2004, during the time this action was stayed, California voters passed Proposition 64, which amended the UCL to require plaintiffs in actions brought under sections 17200 and 17500 to have suffered actual harm as a result of the alleged unfair competition. (§§ 17203, 17204; *Californians for Disability Rights v. Mervyn's* (2006) 39 Cal.4th 223, 228-229 (*Mervyn's*).) In 2006 the California Supreme Court in *Mervyn's, supra,* 39 Cal.4th at pages 232-233, held that the new standing requirements imposed by Proposition 64 applied to pending cases. On the same date, the high court ruled in a companion case that private plaintiffs who lost standing because of Proposition 64 could amend their complaint to substitute new plaintiffs who had suffered injury. (*Branick v. Downey Savings & Loan Assn.* (2006) 39 Cal.4th 235, 241-242.)

D. *Amendment To Substitute Plaintiffs with Standing*

Because Bivens could not meet the Proposition 64 standing requirements, he moved for leave to amend to substitute plaintiffs in his place. In January 2007 the court granted leave to amend.

In plaintiffs' first amended complaint (FAC), they alleged they "sustained injuries and damages arising out of [Fry's]" conduct. They also alleged that they and the putative class they represented "purchased goods sold by [Fry's] as multiple units where [Fry's] displayed the price of an individual unit that comprised, in part, the multiple unit more prominently than the total price of the multiple unit goods."

Fry's brought a demurrer, asserting that plaintiffs did not sufficiently allege damages, they could not state claims against the individual defendants, the claims were

barred by the doctrine of res judicata, and the claims were barred by the statute of limitations.

The court sustained the demurrer with leave to amend on the grounds the plaintiffs lacked standing. In doing so, the court stated, "Plaintiffs failed to allege that they suffered an injury in fact and lost money or property. Instead, the FAC contains the conclusory allegation that they 'sustained injuries and damages.' The fact that Plaintiffs purchased goods from Fry's does not amount to an injury in fact or a claim for loss of money or property. The FAC failed to allege the requisite causation element, as Plaintiffs did not allege that they viewed or relied on any of the advertisements at issue."

E. *Second Amended Complaint and Second Demurrer*

In the SAC, plaintiffs alleged their injury as follows: "Plaintiffs allege that they, as well as the members of the putative plaintiff class, viewed and reasonably relied upon the advertisements, and as a result made a purchase decision in light of an effort to avoid further inconvenience incurred as a result of the misapprehension of the actual price of the merchandise advertised in violation of [section 17504]." The SAC further alleges plaintiffs sustained "injuries and loss of property constituting an identifiable *res*, subject to restitution . . . ."

Fry's demurred to the SAC, again arguing plaintiffs lacked standing to sue because they had not alleged that they lost money or property as a result of Fry's alleged unfair competition. The demurrer also again argued the complaint was barred by the doctrine of res judicata because the issues in this case were identical to those raised in the *Apex* case, and they were barred by the statute of limitations.

The court sustained the demurrer, this time without leave to amend. In doing so, the court found "Plaintiffs have failed to allege an injury in fact as well as the necessary causation element. Nowhere in Plaintiffs' SAC do they allege that they paid money or otherwise gave something to Fry's as a result of the allegedly false advertisements. While Plaintiffs may have expended time, gas, and energy in traveling to Fry's as a result of viewing the advertisements, Plaintiffs do not allege that they subsequently purchased the product at the higher, multiple unit price and thereafter realized they did not pay the advertised price. The act of traveling to Fry's 'in reliance' [on] the advertisement does not constitute an injury in fact." On the causation element, the court stated, "Plaintiffs knew, prior to actually purchasing the advertised item(s), that the advertised price was not the actual price to be paid to Fry's. No money was paid to Fry's for the advertised items(s) in reliance on the advertisements because Plaintiffs became aware of the actual price prior to actually paying for the product."

F. *Award of Costs*

Following entry of judgment in this matter, Fry's filed a memorandum of costs. In that costs memorandum, Fry's sought, among other items, $4,053.75 in filing and motion fees and $1,140.20 in attorney travel costs for appearing at hearings. The costs memorandum detailed the filing and motion fees, which consisted of filing fees, process server fees, and the costs of "Fax & File," which allows litigants to fax documents to messengers, who then file the documents with the court. The costs memorandum also detailed each cost for attorney appearances at hearings, which consisted of airfare, airport

parking and cab fare for four hearings Fry's San Jose-based attorneys attended in San Diego.

Plaintiffs filed a motion to strike or tax Fry's costs, arguing the costs were unreasonable and not recoverable under law. Fry's opposed the motion. In doing so, Fry's filed a declaration from one of its attorneys clarifying that each of the process server costs and "Fax & File" costs were incurred to file documents with the court or serve them on plaintiffs. The declaration also explained these costs were reasonably necessary because "the documents in question were complex pleadings involving substantial legal research and multiple drafts requiring review by multiple persons, and thus were ordinarily not ready for filing and service until the last day that the document could be timely filed and served under the Court rules. Consequently, overnight service would not have been timely for these documents, and messenger services were required."

The court denied plaintiffs' motion. This timely appeal followed.

DISCUSSION

I. *THE DEMURRER*

A. *Standard of Review*

In evaluating a trial court's order sustaining a demurrer, we review the complaint de novo to determine whether it "states facts sufficient to constitute a cause of action." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) In doing so, we accept as true all properly pleaded material facts, as well as facts that may be implied from the properly pleaded facts (*Montclair Parkowners Assn. v. City of Montclair, supra,* 76 Cal.App.4th at p. 790), and we also consider matters that may be judicially noticed (*Evans v. City of Berkeley*

(2006) 38 Cal.4th 1, 6). We do *not* assume the truth of contentions, deductions or conclusions of fact or law. (*Ibid.*) The plaintiff "bears the burden of demonstrating that the trial court erroneously sustained the demurrer as a matter of law" and "must show the complaint alleges facts sufficient to establish every element of [the] cause of action." (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43.) "Because standing goes to the existence of a cause of action, lack of standing may be raised by demurrer . . . ." (*Buckland v. Threshold Enterprises, Ltd.* (2007) 155 Cal.App.4th 798, 813.

B. *Analysis*

Section 17200 prohibits "any unlawful, unfair or fraudulent business act or practice." Section 17500 prohibits untrue or misleading advertising in the sale of real or personal property. When Bivens filed his complaint, any person "acting for the interests of itself, its members or the general public" could bring a UCL action for unfair competition (former § 17204) or false advertising (former § 17535). As the California Supreme Court stated prior to Proposition 64, representative actions "make it economically feasible to sue when individual claims are too small to justify the expense of litigation, and thereby encourage attorneys to undertake private enforcement actions." (*Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116, 126.)

On November 2, 2004, the California voters approved Proposition 64, and it became effective the following day. (Cal. Const., art II, § 10, subd. (a).) Proposition 64 amended section 17204 to state a UCL cause of action may only be prosecuted "by any person who has suffered injury in fact and has lost money or property as a result of the

unfair competition." (§ 17204.) Proposition 64 also amended section 17203 to require that a private party may bring a representative action only if he or she meets the standing requirement of section 17204 and complies with class certification requirements set forth in Code of Civil Procedure section 382. Proposition 64 amended section 17535 to impose the actual injury and class treatment requirements on UCL claims for false advertising.

In *Mervyn's, supra,* 39 Cal.4th at pages 232-233, the California Supreme Court held that the effect of Proposition 64 was to establish that an individual who brings an action under the UCL must meet the revised standing requirements of section 17204; that is, an individual must have "suffered injury in fact and [have] lost money or property as a result of the unfair competition." The court in *Mervyn's* concluded this amended section 17204 applied to pending cases and revoked "the standing of persons who have not been harmed to represent those who have." (*Mervyn's, supra,* 39 Cal.4th at p. 232.) As the high court explained, "For a lawsuit properly to be allowed to continue, standing must exist at all times until judgment is entered and not just on the date the complaint is filed. '[C]ontentions based on a lack of standing involve jurisdictional challenges and may be raised at any time in the proceeding.' [Citations.]" (*Id.* at pp. 232-233.)

In *Branick v. Downey Savings & Loan Assn., supra,* 39 Cal.4th at pages 239-244, the Supreme Court held that under Proposition 64, "the ordinary rules governing the amendment of complaints and their relation back" (*id.* at p. 239) should still apply, such that in a proper case, a trial court may permit a plaintiff to amend a complaint to satisfy Proposition 64's changed standing requirements.

Recently, in *Hall v. Time Inc.* (2008) 158 Cal.App.4th 847, the Court of Appeal addressed the meaning of the "injury in fact" requirement of the amended UCL and held that an injury in fact is " '[a]n actual or imminent invasion of a legally protected interest, in contrast to an invasion that is conjectural or hypothetical.' " (*Hall, supra,* 158 Cal.App.4th at p. 853, citing Black's Law Dict. (8th ed. 2004) p. 801.) Several courts, including *Hall*, have applied the injury in fact requirement to various factual scenarios. In *Hall*, the plaintiff based his UCL claim on allegations a book seller deceptively sent buyers invoices to pay for a book during a free trial period. (*Id*. at p. 850.) The plaintiff received the book, kept it, and did not make payment until after the free trial period expired. (*Id.* at pp. 850-851.) Based upon these allegations, the Court of Appeal held the plaintiff lacked standing to pursue his UCL claim because the plaintiff "did not allege he did not want the book, the book was unsatisfactory, or the book was worth less than what he paid for it." (*Id.* at p. 855.)

Similarly, in *Buckland v. Threshold Enterprises, Ltd., supra,* 155 Cal.App.4th at page 814, the Court of Appeal held the mere purchase of a product is not an "injury in fact" or "loss of money or property" within the meaning of Proposition 64. Likewise in *Chavez v. Blue Sky Natural Beverage Co.* (N.D.Ca. 2007) 503 F.Supp.2d 1370, 1374, a plaintiff claiming the defendant engaged in fraudulent conduct by suggesting by its brand name and product design its beverages were manufactured in New Mexico did not suffer an "injury in fact" because that plaintiff "did not pay a premium for Defendants' beverages because the drinks purportedly originated in Santa Fe, New Mexico."

Based upon the foregoing authority, we conclude plaintiffs did not adequately allege they suffered an "injury in fact" and a "loss of money or property." They only state in a conclusory fashion they "sustained injuries and loss of property." The injuries and loss of property are not identified. They do not identify the products they purchased or how the purchases injured them. They do not state the products were defective, priced higher than their value, or that they did not want the products.

The closest plaintiffs came to attempting to show they were injured as a result of Fry's alleged conduct was to state they purchased the products in "an effort to avoid further inconvenience." However, the "avoidance of inconvenience" does not allege an "injury in fact" or a "loss of money or property." It is a legal conclusion and does not set forth facts stating the nature and extent of the plaintiffs' alleged injuries and what type of money or property they lost.

In their opposition to the demurrer to the SAC, and in their opening brief on this appeal, plaintiffs assert the allegation they made purchases "to avoid further inconvenience" could support an inference plaintiffs lost "time, cost of gas, inconvenience and the lost opportunity to have made the purchase for less . . . ." The problem with plaintiffs' argument is that when given an opportunity to amend and a directive from the court they were required to allege *facts* constituting their injuries, they failed to make such allegations in the SAC. Nor did they request leave to amend,

detailing how they would amend their complaint to allege such "injuries." [3] Under such circumstances, the court acted properly in sustaining the demurrer without leave to amend. (*Everett v. State Farm General Ins. Co.* (2008) 162 Cal.App.4th 649, 655-656 ["'plaintiff does bear the burden of proving there is a reasonable possibility the defect in the pleading can be cured by amendment . . . '"[and] must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading"'"].)

Further, even if we were to consider such allegations, they would not support a claim under the UCL. Damages are not available under the UCL. (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1150 (*Korea Supply*)*;* see *State v. Altus Finance, S.A.* (2005) 36 Cal.4th 1284, 1304; *Kraus, supra,* 23 Cal.4th at p. 137; *Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 173 (*Cortez).*) The UCL only authorizes a trial court to grant restitution, not damages, to private litigants asserting a claim under that statute. (*Cortez, supra*, 23 Cal.4th at p. 180.) Section 17203 of the UCL allows courts to "make such orders . . . as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, *or as may be necessary to restore to any person . . . any money or*

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[3] One sentence in the conclusion section of plaintiffs' opposition points and authorities requested leave to amend. However, it did not state how the SAC would be amended, nor why the court should allow plaintiff another chance to attempt to plead an injury in fact.

property, real or personal, which may have been acquired by means of such unfair competition." (Italics added.)

Restitution, as a remedy under the UCL, must be restorative in nature. The Supreme Court has stated that the "object of restitution is to restore the status quo by returning to the plaintiff funds in which he or she has an ownership interest." (*Korea Supply, supra,* 29 Cal.4th at p. 1149.) "[R]estitutionary awards encompass quantifiable sums one person owes to another . . . ." (*Cortez, supra,* 23 Cal.4th at p. 178.) These awards are for "money that once had been in the possession of the person to whom it [is] to be restored." (*Id.* at p. 177.)

Thus, plaintiffs' allegation they suffered "inconvenience" and the "cost of gas" in traveling to Fryes does not constitute a request for restitution, as this is not an allegation they seek to recover for some benefit they conferred on Frye's and for which they have a legal right of recovery, both requirements for legal restitution. (*Great West Life & Annuity Ins. Co. v. Knudson* (2002) 534 U.S. 204, 213; see *Ghirardo v. Antonioli* (1996) 14 Cal.4th 39, 51.) Nor do the allegations support a claim for equitable restitution, as they are not seeking property in the possession of Frye's as to which plaintiffs have a constructive trust or equitable lien. (*Great West, supra,* 534 U.S. at p. 213.) "To create a constructive trust, there must be a res, an 'identifiable kind of property or entitlement in defendant's hands.' " (*Korea Supply, supra,* 29 Cal.4th at p. 1150.)

Nor can plaintiffs allege causation. In *Hall v. Time Inc., supra,* 158 Cal.App.4th at page 855, the Court of Appeal concluded that a plaintiff in a UCL action must also allege the injury was *caused* by the alleged wrongful conduct: "Even if Hall's payment for the

book could be construed as an injury in fact, he nonetheless would fail to satisfy the second prong of the standing test-that he 'lost money or property as a result' of the alleged unfair competition. We conclude this second prong imposes a causation requirement. The phrase 'as a result of' in its plain and ordinary sense means 'caused by' and requires a showing of a causal connection or reliance on the alleged misrepresentation." (Fn. omitted.) The *Hall* court further explained, "In a fraud case, justifiable reliance is the same as causation thus, '[a]ctual reliance occurs when a misrepresentation is " 'an immediate cause of [a plaintiff's] conduct, which alters his legal relations,' " and when, absent such representation,' the plaintiff ' " 'would not, in all reasonable probability, have entered into the contract or other transaction.' " ' [Citations.]" (*Id.* at p. 855, fn. 2.)

A similar result was reached in *Laster v. T-Mobile USA, Inc.* (S.D.Cal. 2005) 407 F.Supp.2d 1181, 1194, where the federal district court first concluded the plaintiffs had alleged injury in fact: "Plaintiffs claim they entered into a bundled transaction with Defendants whereby they purchased both a phone and cellular service, and in doing so, were provided with a phone that was falsely advertised as 'free' or substantially discounted, when in fact, they were required to pay the sales tax on the full retail value . . . . Such allegations sufficiently allege an injury in fact." (*Ibid.*, fn. omitted.) The plaintiffs' claim, however, failed with respect to the second prong of the test, causation: "Plaintiffs, however, do not include *any* allegations in their [first amended class action complaint] that they relied on Defendants' advertisements in entering into the transactions. While Plaintiffs meticulously describe the allegedly misleading advertisements (as later described in Plaintiffs' pleadings, a 'bait-and-switch' leading to a

'fleece'), none of the named Plaintiffs allege that they saw, read, or in any way relied on the advertisements; nor do they allege that they entered into the transaction *as a result* of those advertisements. [¶] The language of the UCL, as amended by Proposition 64, makes clear that a showing of causation is *required* as to each representative plaintiff. . . . Because Plaintiffs fail to allege they actually relied on false or misleading advertisements, they fail to adequately allege causation as required by Proposition 64. Thus, . . . Plaintiffs lack standing to bring their UCL and [false advertising law] claims." (*Ibid.*; see also *Cattie v. Wal-Mart Stores, Inc.* (S.D.Cal. 2007) 504 F.Supp.2d 939, 946.)[4]

Plaintiffs in this case also cannot establish causation. Regardless of what plaintiffs thought the advertisements meant, at the time they purchased goods from Fry's they knew the price of the merchandise and still went ahead with the transaction. They do not allege they paid too much for the merchandise, sought to return all or a portion of it, or that they were unhappy with the products. Thus, the alleged misleading advertisements did not cause any damages to plaintiffs. The court did not err in granting Fry's demurrer based upon a lack of standing.[5]

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4 Several California appellate court decisions that reached the same conclusion are under review by the California Supreme Court. The docket for the lead case, *In re Tobacco II Cases*, review granted November 1, 2006, No. S147345, indicates briefing and supplemental briefing is complete and the cases are awaiting oral argument.

5 Based upon our holding, we need not address Fry's contention the demurrer ruling should be affirmed because the complaint is barred by the doctrine of res judicata and the statute of limitations.

II. *COSTS*

A. *Standard of Review*

Because the costs sought by Fry's were discretionary, we review the court's ruling denying the motion to strike or tax costs for abuse of discretion. (Code Civ. Proc., § 1032, subd. (a)(4); see *Perko's Enterprises, Inc. v. RRNS Enterprises* (1992) 4 Cal.App.4th 238, 244.) Under Code of Civil Procedure section 1033.5, subdivision (c)(2), " '[a]llowable costs shall be reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation.' " (*Perko's, supra*, at p. 244.)

Moreover, on an appeal of a costs determination, we apply the rule that " '[a] judgment or order of the lower court is presumed correct. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error. [Citations.]' [Citation.]" (*Rappenecker v. Sea-Land Service, Inc.* (1979) 93 Cal.App.3d 256, 266, italics omitted.)

B. *Analysis*

Plaintiffs assert that because they filed a motion to strike or tax costs, this shifted the burden to Fry's to show the costs incurred were reasonably necessary to the litigation. This contention is unavailing.

"[T]he mere filing of a motion to tax costs may be a 'proper objection' to an item, the necessity of which appears doubtful, or which does not appear to be proper on its

face. [Citation.] However, '[i]f the items appear to be proper charges the verified memorandum is prima facie evidence that the costs, expenses and services therein listed were necessarily incurred by the defendant [citations], and the burden of showing that an item is not properly chargeable or is unreasonable is upon the [objecting party].' [Citations.]" (*Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 131.) "[A] party's 'mere statements in the points and authorities accompanying its notice of motion to strike cost bill and the declaration of its counsel are insufficient to rebut the prima facie showing [that the costs were necessarily incurred].' " (*Jones v. Dumrichob* (1998) 63 Cal.App.4th 1258, 1266, quoting *Rappenecker v. Sea-Land Service, Inc., supra,* 93 Cal.App.3d at p. 266.) Whether a cost item was reasonably necessary is a question of fact for the court's determination. (*Jones v. Dumrichob, supra,* at p. 1266.)

Plaintiffs do not assert Fry's failed to meet its prima facie burden. Rather, plaintiffs fault Fry's for not producing evidence its costs were reasonable and necessary. However, the burden of proof did not shift to Fry's because plaintiffs' moving papers were not accompanied by any competent evidence to rebut the presumption Fry's costs were reasonable and necessary.

Further, a review of the costs incurred and awarded by the court demonstrates plaintiffs have failed to meet their burden of proof that the costs were unreasonable. Plaintiffs allege, in conclusory fashion, that Fry's requested "an alarming amount of more than $4,000 for 'filing and motion fees.' " They further complain that "Fax & File" costs were "mere[ly] postage" costs, process server fees were not recoverable under the law and were unreasonable as they could have served the papers by overnight delivery, the

cost of air travel was unnecessary as counsel could have appeared telephonically, the costs of cab fare from the airport was unreasonable, as counsel could have taken a city bus, and the costs of airport parking was unnecessary as counsel "could have taken a bus or gotten a ride from a friend."

First, the reasonable cost of messenger services, including the "Fax & File" system used by the Superior Court of San Diego County, are recoverable as costs, in the discretion of the court. (Code Civ. Proc., § 1033.5, subd. (c)(4); *Ladas v. California State Auto. Assn.* (1993) 19 Cal.App.4th 761, 776.) Fry's counsel's declaration adequately explained the need for the messenger services, and plaintiffs have submitted no evidence to the contrary. Plaintiffs have not provided any authority that a party whose counsel resides out of town may not have its counsel travel to court to attend hearings or that it is unreasonable to drive and park at an airport or take a cab to a hearing.

"Determination of whether a cost is reasonable is within the trial court's discretion." (*Thon v. Thompson* (1994) 29 Cal.App.4th 1546, 1548.) "[T]rial courts have a duty to determine whether a cost is reasonable in need and amount. However, absent an explicit statement by the trial court to the contrary, it is presumed the court properly exercised its legal duty." (*Id.* at pp. 1548-1549.) On this record, we find no abuse of discretion.

DISPOSITION

The judgment is affirmed.

NARES, J.

WE CONCUR:

BENKE, Acting P. J.

IRION, J.